IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-596

MRS. CARNELL RUSS, VERNA RUSS, a minor, ROOSEVELT RUSS, a minor, ANGELA RUSS, a minor, CURTIS RUSS, a minor, SYLVIA RUSS, a minor, ANTHONY RUSS, a minor, TRANCE RUSS, a minor, and PATRICIA RUSS, a minor, by their mother and next friend, Mrs. Carnell Russ,

Petitioners,

—vs.—

CHARLES LEE RATLIFF,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF
OF THE
CITY OF STAR CITY, ARKANSAS

By: ODEL C. CARTER
P. O. Box 598
Star City, Arkansas 71667
Attorney for Amicus Curiae

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THE INTEREST OF THE AMICUS CURIAE

The interest of the Amicus Curiae is:

1. That although the City of Star City, Arkansas, is not a party to this petition, the purpose of the petition is to require the lower court to permit the petitioners to make the City of Star City, Arkansas, a party to the suit.

2. Since the petitioners are seeking to make the City of Star City, Arkansas, a party to the suit it has a vital interest in filing a brief opposing the relief requested by the petitioners, since if it is not permited to file a brief there will be no one to speak in opposition to the petition.

3. That the petitioners have consented to the filing of this brief by an Amicus Curiae; and that since the whereabouts of the respondent is unknown, his consent cannot be formally obtained but it is anticipated that he will have no objections nor file a brief of his own.

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WHY WRIT SHOULD NOT BE GRANTED

POINT I

THE DISTRICT COURT DOES NOT HAVE JURISDICTION OVER THE CITY OF STAR CITY, ARKANSAS, TO GRANT RELIEF UNDER THE THEORY OF RESPONDENT SUPERIOR PURSUANT TO 28 U. S. C. SECTION 1331.

The petitioners' state in their motion for leave to amend the jurisdictional averments and to add Third Party Defendants that "the plaintiffs seek to add the City of Star City, Arkansas, to the action as a party defendant asserting that, as a matter of law, it is responsible for the wrong doing of its employee under the doctrine of respondent superior."

In determining whether or not a city is responsible under the doctrine of respondent superior, it is necessary to look to state law to determine whether or not a cause of action is permissible under such theory. It has long been held that the Eighth and Fourteenth Amendments to the U. S. Constitution applies only to state action. See *Brown v. City of Wisner, Louisiana*, et. al. 122 F. Supp. 736 at page 738 where it is stated:

> "There was no unjust discrimination by the state or the municipality. The Fourteenth and Fifteenth Amendments apply only to state action, as such, not two wrongs perpetrated by one individual upon another."

Purely private action is insulated from the Fourteenth Amendment. *McCain v. Davis* 217 F. Supp. 661 at page 666.

The Fifth Circuit Court of Appeals acknowledged the doctrine of immunity as late as 1976 in the case of *Reeves v.*

City of Jackson, Mississippi, et. al. 532 F. 2d 491 at page 495 where we find the following quotation:

> "We agree with the defendants that it is for Mississippi Courts and not the Fifth Circuit to do away with this blanket of immunity ..."

State immunity has also been held to be a good defense in the Ninth Circuit 1973 - in the case of *Boettger v. Moore* 483 F. 2d 86.

Perhaps the best response to the appellants' position is found in the decision of *Mitchell v. Libby* 409 F. Supp. 1098 (1976) at page 1099 where we find the following passage from the order of Chief Judge Holden, as follows:

> "In considering the present motion to dismiss, it is necessary to determine whether the plaintiff's complaint states a cause of action under the "federal question" jurisdiction provided for in 28 U.S.C. § 1331. More particularly, the issue is whether there exists a federal claim based directly upon the Fourteenth Amendment and the rights incorporated therein. Some support for such a cause of action is indicated in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (private Fourth Amendment cause of action against federal officials), and the concurring opinions of Justices Brennan and Marshall in *City of Kenosha v. Bruno*, 412 U.S. 507, 516, 93 S. Ct. 2222, 2228, 38 L. Ed. 2d 109, 118 (1973). The panel decision of the Second Circuit in *Brault v. Town of Milton*, 527 F. 2d 730 (2d Cir. 1975), would probable have been controlling in favor of the plaintiff's Fourteenth Amendment claim. But that court's en banc decision clearly recedes from holding that a direct cause of action exists under the

Fourteenth Amendment. Id. at 736-41. Therefore, such lower court decisions as *Perzanowski v. Salvio*, 369 F. Supp. 223, 228-31 (D. Conn. 1974), rejecting the direct cause of action argument, may be regarded as accurate reflections of the present state of the law in the Second Circuit. Hence the plaintiff's direct Fourteenth Amendment claim must fail."

Arkansas's municipalities are provided with immuinity from tort liability.

Arkansas Statute 12-2901 provides "State subdivisions immune from tort liability. It is hereby declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the State, shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees."

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT THE PETITIONERS' MOTION TO ADD THE CITY OF STAR CITY, ARKANSAS, AS A THIRD PARTY DEFENDANT SINCE ALL OF THE REQUIREMENTS OF RULE 15 HAD NOT BEEN MET BY THE PETITIONERS', AND SINCE TO DO SO WOULD HAVE BEEN PREJUDICIAL TO THE CITY OF STAR CITY, ARKANSAS.

In order to comply with Rule 15(C) of the Federal Rules of Civil Procedure all three requirements must be met. Tney are: (1) the amended claim must arise out of the same occurrence set forth in the original pleading; (2) within the period provided by law for commencing an action against him, the pruported substitute defendant must have received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (3) such purported substitute defendant must have or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

For reasons 2 and 3 above the Petitioners' motion to add the City of Star City, Arkansas, as a Third Party Defendant should not have been granted.

There is no conceivable way that the petitioners can contend that there was a mistake concerning the identity of the City of Star City, Arkansas, which they now claim was a proper party, at the time that they brought their original suit and their first amendment to original complaint. The style of both the original complaint and the amendment to complaint was as follows:

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

MRS. CARNELL RUSS, VERNA RUSS, a minor, age 14, ROOSEVELT RUSS, a minor, age 12, ANGELA RUSS, a minor, age 10, CURTIS RUSS, a minor, age 9, SYLVIA RUSS, a minor, age 8, ANTHONY RUSS, a minor, age 7, JOYCE RUSS, a minor, age 5, TRANCE RUSS, a minor, age 3, and PATRICIA RUSS, a minor, age 2, by their mother and next friend, MRS. CARNELL RUSS

Plaintiffs

vs. Civil Action No. PB73 C-96

CHARLES LEE RATLIFF, NORMAN DRAPER JERRY MAC GREEN, LYNN THOMASSON, Mayor of Star City, Arkansas, EARL GRUMBLES, NOEL LEACH, W. B. BURNS, SR., W. H. FRIZZELL, GUS DOZIER and G. D. SMITH, SR., members of the Council of Star City, Arkansas

Defendants

It will be noted that the petitioners were very conscious of the identity of the City of Star City at the time of the filing of the original complaint and at the time of the filing of the amendment to complaint since they specifically referred to the "Mayor of Star City, Arkansas" and to the "Members of the Council of Star City, Arkansas".

The case of *Simmons v. Fenton* (Seventh Circuit 1973) 480 F. 2d 133 is quite similar in several respects to the case here. In the *Simmons* case the plaintiffs sued a 12 year old girl by using the wrong first name when they intended to use the first name of the mother. The plaintiffs then sought to amend their complaint to add the correct Third Party after the Statute of Limitations had run. The court in the

Simmons case, after setting out the three requirements of Rule 15(C), as above mentioned, states, starting at the bottom of page 135 as follows:

> "Plaintiffs summarize their position by the following statement on brief: 'Inasmuch as the plaintiffs seek only to correct the Christian name of the intended defendant who was actually served with process and who both personally and through her representatives had full knowledge that these plaintiffs were in process of instituting suit against her; that her insurance representatives had fully and thoroughly investigated the circumstances attending the cause of plaintiff's complaint, it is believed that the granting of an amendment relating back to the original complaint will do no violence to the intendment of Rule 15(C) and that the circumstances of this case in fact fall squarely within the intent of said amendment.' They conclude by conceding 'in deference to intellectual honesty, that the defendant, Teresa Fenton, is technically entitled to the summary judgment which she seeks.' However, under the circumstances found present here and agreeable with the rationale of the cases they cite, plaintiffs continue to urge that Rule 15(C) requires that when an intended defendant is served with process under a mistaken name a plaintiff is entitled to the requested amendments of both the complaint and the service of process.
>
> Plaintiffs seek to do more than merely correct a mistake in the Christian name of an intended defendant caused by inadvertence of counsel. They are attempting to substitute parties defendant after the statute of limitations has run. A reading of Rule 15(C) expressly conditions the relation back of 'an amendment changing the party against whom a claim is asserted' upon

the concurrence of three prerequisites, viz.: (1) the amended claim must arise out of the same occurrence set forth in the original pleading; (2) within the period provided by law for commencing an action against him, the purported substitute defendant must have received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (3) such purported substitute defendant must have or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Clearly, the requirements of prerequisite (1) have been fully met. It is equally clear to us that the requirements of prerequisites (2) and (3) have not been met. The time within which the action against Doris J. Fenton necessarily had to have been brought expired on August 28, 1970. Even if it might be said that she should have known immediately of the case of mistaken identity when service was made upon her 12-year-old daughter or, to go further, even if the service might be said to have been upon her, Rule 15(C) is not satisfied, since actual service on whoever was served was not effected until September 22, 1970, at least three weeks after the tolling of the statute of limitations. Further, since Doris J. Fenton is not now before the court and, in fact, has never yet been served with process, there is clearly prejudice to her if the amendment is allowed. To allow the amendment will be to deprive her of the defense of the statute of limitations. Such a defense is a complete bar to the action, and to deny it makes the prejudice complete and final. This is in direct conflict with the language of the rule that she 'will not be prejudiced in maintaining (her) defense on the merits.'

> An adequate consideration of the basic principles to be applied in cases involving a change or alteration of the parties to an action pursuant to Rule 15(C) has been furnished by District Judge Grubb in *Aarhus Oliefabrik, A/S v. A. O. Smith Corp.*, E. D. Wis., 22 F. R. D. 33, 36 (1958): 'Thus, amendment with relation back is generally allowed in order to correct a misnomer of defendant where the proper defendant is already in court and the effect is merely to correct the name under which he is sued. But a new defendant cannot normally be substituted or added by amendment after the statute of limitations has run.' "

The purpose of the 1966 Amendment to Rule 15(C) was to protect parties in the position of the City of Star City, Arkansas, from the methods which the petitioners now propose to use to bring the said City into the lawsuit. See the case of *Traveler's Indemnity Company v. U. S.*, for Use of Construction Specialties Company (1967) 382 F. 2d 103 at page 106 where we find the following:

> "The exercise of discretion in this area necessarily involves concern for the rights of the amending party; but the rights of the added party likewise cannot be ignored. Indeed, the very purpose of the 1966 Amendment to Rule 15(C) is the protection of the added parties' rights by enumerating the conditions that must be satisfied before relation back of the amendment will be allowed."

This cause of action accrued on May 31, 1971, the date of the death of Carnell Russ. A suit was filed on May 30, 1973, naming the mayor, and referring to him as the Mayor of Star City, Arkansas, as one of the defendants, and naming the Aldermen of the City of Star City, Arkansas, as others of the defendants, and referring to them as Members

of the Council of Star City, Arkansas. On September 17, 1975, the court entered an order granting a motion to amend the cause of action to include the Eighth Amendment to the Constitution of the United States and pendent jurisdiction to include the Arkansas Wrongful Death Act, being Arkansas Statute 27-906 and 27-907. As mentioned above the identity of the City of Star City was known to the plaintiffs at all times and yet no motion was filed to add the City of Star City, Arkansas, as a party defendant until September 30, 1977, several years after the Statute of Limitations had run.

In the District Court's order of November 10, 1977, the court observed "the court can perceive no reasonable justification for the delay in asserting for the first time that jurisdiction is invoked pursuant to 28 U. S. C. Section 1331." Apendix Page 2a

Such a finding by the court was certainly justified due to the length of time involved and due to the fact that it would be to the great prejudice of the City of Star City in that it would prevent them from raising their defense of the Statute of Limitations.

It was stated in the case of *Imperial Enterprises, Inc. v. Fireman's Fund Insurance Company* (1976) 535 F. 2d 287 rehearing denied 540 F. 2d 1085 that:

> "With respect to the cross-appeal, Fireman's Fund asserts that the District Court erred in not allowing it to amend its answer to allege a counterclaim against Imperial Enterprises. The counterclaim sought recovery of the amount allegedly paid mistakenly on the building policy. The District Court refused to permit it on the grounds of untimeliness and its permissive nature. In view of the untimeliness of the attempted amendment - - Fireman's Fund was aware of the facts underlying its alleged counterclaim for almost a year before it made its motion - - we are unable to conclude that the District Court abused its discretion in denying the motion to amend with respect to the counterclaim."

The motion for leave to amend complaint is within the court's discretionary power and failure to grant such motion is ordinarily not reversible error. *Hale v. Ralston Purina Company*, C. A. Ark. 1970, 432 F. 2d 156.

In a case involving the commencement of a second action alleging substantially the same claims brought by the appellant and by an additional party on behalf of still other parties, the District Court did not abuse its discretion in denying appellants' motion to amend its complaint and add or join parties plaintiff. *Buckley Towers Condominium, Inc. v. Buchwald* 533 F. 2d 934.

The granting of leave to amend pleadings pursuant to Rule 15 stating that leave shall be freely given when justice so requires is within the discretion of the Trial Court. *Zenith Radio Corporation v. Hazeltine Research, Inc.* 91 S. Ct. 795, 401 U. S. 321, 28 L. Ed. 2d 77, rehearing denied 91 S. Ct. 1247, 401 U. S. 1015, 28 L. Ed. 2d 552.

In a case where, for almost two years of pleadings, amendments, interrogatories, and all the other trappings of multi-parties, multi-issue trial, including trial itself, issue had been whether contract had been interferred with, not whether there had been an interference with the business relation, trial court did not abuse discretion in refusing proposed amendment of complaint to seek recovery for tortious interference with business relationship. *American Hot Rod Association, Inc. v. Carrier* 500 F. 2d 1269.

As pointed out by authorities hereinabove mentioned, permitting a party to amend its complaint to bring in an additional party after the Statute of Limitations has run is in itself prejudice as forbidden by Rule 15 (C). The Arkansas Statute of Limitations applicable to substantive offenses most closely related to that which the petitioners have alleged is the Arkansas Wrongful Death Statute which the petitioners herein were permitted to include in their first amendment to complaint. The applicable part of the Arkansas Wrongful Death Act is as follows:

> Arkansas Statute 27-906. Wrongful Death actions and their survivorship. "Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company, or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death may have been caused under such circumstances as amount in law to a felony.."
>
> Arkansas Statute 27-907. Parties and Limitations. "Every such action shall be brought by and in the name of the personal representative of such deceased person, and if no personal representative, then same shall be brought by the heirs at law of such deceased person. Every action authorized by this act shall be commenced within three (3) years after the death of the person alleged to have been wrongfully killed and not thereafter."

Under Arkansas law where there is an amendment to a complaint stating a new cause of action or bringing in new parties interested in the controversy, the Statute of

Limitations runs to the date of the amendment and operates as a bar when the statutory period of limitations has already expired. See *Bridgman v. Drilling* 218 Ark. 772, 238 S. W. 2d 645; and *Wilson v. Missouri Pacific Railroad Company* 58 F. Supp. 844.

The Third Circuit Court of Appeals in the case of *Ammlung v. City of Chester* (1974) 494 F. 2d 811 held that a federal civil rights action, which was commenced more than two years after plaintiff's son died of aspiration of vomit after being jailed and in which it was alleged that there had been illegal arrest, false imprisonment, illegal search and seizure, assault and battery, criminal negligence, cruel and unusual punishment and due process violations arising from failure to advise son of constitutional rights, did not sound in conspiracy, but if it did, action was barred by Pennsylvania Statutes of Limitation applicable to substantive offenses most closely related to that which defendants were alleged to have conspired to commit. In this case on appeal our applicable statute of limitation of the State of Arkansas applies and is as above set out.

In 1973 the case of *Reed v. Hutto*, 486 F. 2d 534, held that where Arkansas Statute 37-201 provided that suits for assault had to be brought within one (1) year, that actions founded on any contract or liability, expressed or implied, had to be brought within three (3) years, and that all other actions must be brought within five (5) years, civil rights action by prisoner against prison officials who allegedly failed to protect him from being forced to participate in homosexual acts with inmate trustee guard was required to be commenced within three (3) years and failure to do so required dismissal of action.

It can be seen from the foregoing authorities that the trial court in this case did not abuse its discretion in denying

the appellants' motion to add the City of Star City as a Third Party Defendant, but if the court had done so it probably would have been an abuse of discretion since the petitioners did not meet two of the three requirements of Rule 15(C) since (1) the amendment would have been to the prejudice of the said City of Star City in maintaining its defense, and (2) there was no mistake on the part of the appellants concerning the identity of the City of Star City at all times if it was in fact a proper party, and further the Statute of Limitations had run.

If the City of Star City, Arkansas, was made a party at this late date it would be very much prejudiced by the additional fact that Trooper Jerry Mac Green is no longer a party to this lawsuit and the City, therefore, would be precluded from bringing him back into this cause of action and implicating him as it could have done if the City had been a party to the original suit in that the testimony of Mr. Green at the trial of Mr. Ratliff in the Circuit Court of Lincoln County, Arkansas, for manslaughter was vastly different from what it was on the trial of this case in Federal Court which could have made a difference in the outcome, if these discrepancies had been pointed out, and if Mr. Ratliff had been adequately represented - - he having represented himself - - which all would be to the detriment of the City of Star City if it had to defend at this time.

Furthermore, as admitted by the petitioners the City of Star City, Arkansas, now has a different City Council, one of the old members, G. D. Smith, Sr., now being deceased, and the former Mayor, Lynn Thomasson, now being quite elderly, all of which would prejudice the City of Star City in its defense if it was now made a party defendant.

CONCLUSION

The action of the trial court in refusing to permit the petitioners to amend their complaint to add the City of Star City, Arkansas, as a party defendant, was not an abuse of discretion since to do so would be to the irreparable prejudice of the City of Star City, Arkansas, and since the identity of the City of Star City, Arkansas, was known to the appellants at all times and could have been made a party to the suit originally if it had been a proper party. Therefore, the petition should be denied.

Respectfully Submitted,

ODELL C. CARTER
P. O. Box 598
Star City, Arkansas 71667
Amicus Curiae on behalf
of the City of Star City, Arkansas

CERTIFICATE OF SERVICE

I, Odell C. Carter, the attorney for the Amicus Curiae herein, certify that on the 2nd day of November, 1978, I did serve three (3) copies of the foregoing Brief of Amicus Curiae upon the attorney for the Petitioners by mailing the same, prepaid, first class, as follows: James I. Meyerson, 1790 Broadway, 10th Floor, New York, New York 10019. In addition, I have served three (3) copies of the same upon the Respondent by mailing the same, postage prepaid first class, at his last known address, as follows: Mr. Charles Lee Ratliff, General Post Office Delivery, Star City, Arkansas 71667.

Respectfully submitted,

Odell C. Carter

ODELL C. CARTER
P. O. Box 598
Star City, Arkansas 71667
Attorney for Amicus Curiae